Liberty Pavilion Nursing Home *and* Professional and Health Care Division, Local 1445, United Food and Commercial Workers Union, AFL-CIO. Case 1-CA-18108

January 27, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On October 21, 1981, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

FRANK H. ITKIN, Administrative Law Judge: An unfair labor practice charge was filed in this case on December 2, 1980. Amended charges were filed on December 11, 1980, and on January 5, 1981. A complaint issued on January 15, 1981. A hearing was held in Boston, Massachusetts, on August 13, 1981. The General Counsel alleges that Respondent Employer violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to execute a written contract with the Charging Party Union after having "reached full and complete agreement with respect to the terms and conditions of employment" of Respondent's employees in an appropriate bargaining unit. Respondent Employer denies that it has violated the Act as alleged.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the brief filed by the General Counsel, I make the following:

FINDINGS OF FACT

Respondent Home is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act. The Union is admittedly a labor organization within the meaning of Section 2(5) of the Act. On December 17, 1979, the Union was certified as exclusive bargaining agent of the following unit employees:

> All full-time and regular part-time service and maintenance employees including dietary employees, dietary aides, housekeeping employees, ward clerks, nurses aides, orderlies, laundry employees, receptionists, bookkeeper and assistant bookkeeper employed by the Respondent at its Danvers, Massachusetts facility, but excluding all professional employees, technical employees, RN's, LPN's, social workers, occupational therapists, chef, head dietician, guards and supervisors as defined in the Act.

Union Representative Paul Dufault testified that commencing about February 1, 1980, the parties met at approximately 14 bargaining sessions and "reached an agreement" on a collective-bargaining contract on August 25, 1980. The "agreement" was "ratified by the Union's membership" on September 9, 1980. Later, on October 29, 1980, the Union delivered to counsel for Respondent "a contract in final form for signing" and submission to the Massachusetts Rate Setting Commission.[1] The "contract" (G.C. Exh. 2) provides, *inter alia*:

> APPENDIX A—WAGES
>
> The individual straight time hourly rate of pay of all employees shall be increased by the following amounts on the following dates:
>
> Effective July 1, 1980, a general increase of 25¢ per hour;
>
> Effective November 1, 1980, a general increase of 25¢ per hour;
>
> Effective July 1, 1981, a general increase of 50¢ per hour.
>
> New employees shall receive a starting rate of 3.60 per hour and after (sixty (60)) days, 3.85 per hour, and shall receive the general wage increases set forth above.
>
> * * * * *
>
> The terms set forth in Appendix A—Wages—reflect the settlement reached between the Home and the Union subject to approval of the Massachusetts Rate Setting Commission. Any retroactive monies to July 1, the effective date, shall also be subject to approval of said Commission. It is understood that the Home shall make application for implementation of those wages set forth in Appendix A and that the Union will also apppear before the Commission with the Home in order to secure the wage adjustment agreed to in negotiations and no retroactive monies will be paid until approval of the Commission.

[1] The role of the Commission, insofar as pertinent here, is discussed below.

Dufault further testified that he later "checked" with the Massachusetts Rate Setting Commision in order to ascertain whether the Home had "presented" the "contract" and "application" for "approval." Dufault discovered that "the owner of the Home, Gerald Martin, had failed to sign the particular agreement" and, consequently, "the Rate Setting Commision had failed to rule on the application because of the failure of the Home to sign the agreement." Dufault explained:

> We had to go into state court and get a motion to get the Home to furnish the necessary documentation to the Rate Setting Commission, so that they could comply with what the Commission requested in order to secure some rate adjustments, so that the employees could get a pay raise.

Following this court action: the Home "executed the contract, and qualified it, on May 13, 1981, and submitted it to the Rate Setting Commission." (See G.C. Exh. 3.)[2]

According to Dufault, the Commission thereafter "granted" the Home what amounted to a .24 increase in their daily room rate allowance. The notification from the Commission to the Home, dated July 20, 1981, states (G.C. Exh. 4):

> This is to inform you that the [Commission], after consideration of your petition for an adjustment to the fiscal year 1981 interim rate of payment, took the following action:
>
> A change in the rate from $36.08 to $36.32 effective 3/1/81.

The Home, in its application to the Commission, had requested "an increase in our interim rate of at least $1.90." See Resp. Exh. 1.[3]

James E. Sullivan, director of the bureau of longterm care in the Massachusetts Rate Setting Commission, explained that his Commission "sets rates of payment to providers of health care, such as hospitals, nursing homes and ambulances," and these "rates will be paid for by the Department of Public Welfare." Director Sullivan, in further explaining how the Commission determined in July 1981 to allow the Home a .24 increase in its rate (see G.C. Exhs. 4 and 5), testified as follows:

> Q. The petition [of the Home] seeks an interim rate increase of $1.90 per patient per day. Is that correct?
>
> A. Yes.
>
> Q. Does that figure in the petition, $1.90, accurately reflect the cost of a wage increase pursuant to the contracts, Exhibits #3 and 4, I believe?
>
> A. I don't know.
>
> Q. Did the Commission take into consideration the wage increase contemplated by the collective bargaining agreement in computing an interim rate increase based upon the petition, Respondent's Exhibit #1?
>
> A. No.
>
> Q. Could you tell us why the Commission did not take into consideration in determining an interim rate increase pursuant to Respondent's Exhibit #1, that's the petition for an interim rate?
>
> A. Yes. The Commission does not take into account raises contemplated, but relies on the fact that the provider [the Home] provide evidence that costs have increased beyond the base year plus the cost adjustment factor.
>
> Q. So is it fair to say that the Rate Setting Commission or the rate structure in the Commonwealth of Massachusetts is predicated on—or rate of reimbursement is predicated on—an actual cost, an expenditure?
>
> A. Yes.
>
> Q. The Rate Setting Commission will not consider costs that are anticipatory, i.e., for example in the collective bargaining agreement.
>
> A. Not in this section of the regulations.
>
> Q. As it relates to wages?
>
> A. Yes.
>
> Q. So is it fair to say that the parties to the collective bargaining agreement can never obtain prior approval to any rate increase provided in a collective bargaining agreement?
>
> A. That's fair to say.

The director added: "The .24 increase [which the Commission allowed] was based on evidence supplied in June [198] that the June 13th payroll [of the Home] represented an amount that was in fact higher than the *base year 1979* plus [*a cost adjustment factor of*] 12.94 percent." The cost adjustment factor, the director noted, essentially reflects the Consumer Price Index as adjusted to the industry involved here.

In addition, Director Sullivan also testified:

> Q. Do I understand you to say that in Appendix A of General Counsel's Exhibit #2 [if] the wages reflected there were actually implemented, the Commission will allow reimbursement for those rates?
>
> A. I can't say that. The Commission certainly would consider them, and there would then be evidence that they were being paid. Then that evidence would be taken and measured against whether or not the Commission was already reimbursing those amounts.
>
> * * * * *
>
> Q. On a number of occasions, both by my questions and the court's you've indicated that if the wage increases as contemplated by this collective bargaining agreement were implemented, that the

[2] The Employer, in signing the "agreement" (G.C. Exh. 3), noted, *inter alia*, above his signature that it "is signed" pursuant to the court's order subject to "whatever appellate remedies" are available.

[3] Dufault claimed that since the Home had received a percentage of the "increase" requested, a "percentage of that should go back to the employees as part of wage increase." Dufault, however, was unable to explain what portion of the 24-cent increase allowed by the Commission should be allocated to employee wages and, consequently, how much employee wages should in fact be increased, if at all.

Rate Setting Commission would act and would reimburse. Is that correct?

A. No, I haven't said that.

Q. I guess I misunderstood you.

A. I think I can just clarify that.

Q. Okay, go ahead.

A. If these wages based on these contracts were paid, and the provider submitted evidence of that payment, that it would then be compared with the rate because it is conceivable that a nursing home could enter a contract, increase wages, pay them, and already be reimbursed within the rate. In fact, it is almost inevitable that in some portion, that would occur.

JUDGE ITKIN: In other words, what you're saying is that 24 cents increase already allowed may cover part of the total $1.90 if that base figure is correct.

THE WITNESS: That is correct.

* * * * *

Q. Can you here today speak on behalf of the Commission with regard to whether or not an increase would be granted to cover the increased costs if the wage increases covered by the collective bargaining agreement were implemented?

A. I can speak on behalf of the Commission, but I couldn't answer that in a yes or a no.[4]

Discussion

It is settled law that "when an oral agreement is reached as to the terms of a collective-bargaining contract, each party is obligated, at the request of the other, to execute that contract when reduced to writing, and failure or refusal to do so constitutes an unfair labor practice." *Oil Chemical and Atomic Workers International Union and its Local 7-507 (Capitol Packing Company)*, 212 NLRB 98, 108 (1974). It is also settled law that, where there is "no meeting of the minds" as to essential terms of an agreement which may be traced to "ambiguity for which neither party is to blame," there is in effect no "contract" which the parties can be directed to execute. *Capitol Packaging Company, supra*, 212 NLRB at 107-108, quoting from Reinstatement Contracts, §501 (1932). In sum, as the Restatement notes:

> When, however, misunderstandings may be traced to ambiguity for which neither party is to blame, or for which both parties are equally to blame, and the parties differ in their understanding, their seeming agreement will create no contract. [*Id.* at 108.]

Also see *B. F. Goodrich Chemical Co., etc.*, 232 NLRB 399, 401-401 (1977), where the Administrative Law Judge, in dismissing a complaint, noted, with Board approval, "What does emerge in my opinion is a mutual misunderstanding concerning inclusion of the qualifying language at issue here, for which misunderstanding neither party is at fault. . . . I accordingly conclude that Respondent did not violate the Act by refusing to execute" the document.

The evidence of record here, summarized *supra*, is essentially undisputed. The parties, after some 14 bargaining sessions, arrived at what they believed to be a full and complete "agreement." However, with respect to that portion of the "agreement" pertaining to "wages," the parties expressly made this provision "subject to approval of the Massachusetts Rate Setting Commission," including "any retroactive monies," stating further that "no retroactive monies will be paid until approval of the Commission." Thus, commission approval was to be a *condition precedent* to the implementation of the wage provision. And, as Director Sullivan credibly explained, his Commission will not approve rate increases based on a "contemplated. . . collective bargaining agreement"; the Commission will only reimburse for an "actual cost or expenditure"; and, therefore, it is "fair to say that the parties to the collective bargaining agreement can never obtain prior approval to any rate increase provided in a collective bargaining agreement." Accordingly, as a consequence of this mistake or misunderstanding, an essential portion of this "agreement" pertaining to wages cannot be implemented.

Neither party has been shown here to be at fault or to blame for this mistake or misunderstanding. There is therefore no meeting of the minds as to an essential contractual provision. Moreover, there is no demonstrated basis on which I can rely in correcting this mistake or misunderstanding so as to reflect the agreement of the parties. Implementation of the wage provisions was expressly made "subject to approval" by the Commission. To implement this contract so as to render it operative and meaningful, I would be required to rewrite the agreement, changing the *condition precedent* to a *condition subsequent*, directing payment of the wage increases, and providing for reimbursement to the Employer in the event the Commission fails to grant approval commensurate with the wage increases. I perceive this to be beyond my authority under the Act and certainly beyond the boundaries of this complaint. Likewise, I cannot sever the wage provisions from the entire "agreement" and require signing what remains. That too is contrary to the seeming agreement of the parties.

In sum, the General Counsel has failed to sustain his burden of proof here and the complaint is dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce as alleged.

2. Charging Party Union is a labor organization as alleged.

3. The General Counsel has failed to establish by a preponderance of the evidence that Respondent violated Section 8(a)(5) and (1) of the Act as alleged.

4. The complaint will therefore be dismissed in its entirety.

[4] Pelino Campea, associated with Regional Management Resources, Inc., testified, on behalf of the Home, that the "wage costs" for the Home between 1979 and 1980 "rose higher than the 12.94 wage adjustment allowed by the Rate Setting Commission."

ORDER[5]

I recommend that the complaint herein be dismissed in its entirety.

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.